United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a Corporation.
Plaintiff in Error,
—vs.—
ANNA F. FRESCOLN,
Defendant in Error.

No. 2887.

BRIEF OF PLAINTIFF IN ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

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STATEMENT.

This proceeding for review presents the following question:

Under the statutes of Washington, where a man receives personal injuries as a result of the negligent act of another, and during his lifetime institutes an action to recover therefor, and upon his death as a result of said injuries, prior to the final judgment, his wid-

ow revives and prosecutes such action for personal injuries to judgment, does an independent action for wrongful death lie in favor of the widow, or is said action barred by the former recovery?

The following facts are admitted by the pleadings:

On January 22, 1914, one J. W. Frescoln commenced an action in the Superior Court of the State of Washington for King County against the plaintiff in error, to recover $5,323.00 for personal injuries received on November 22, 1913, while alighting from one of the street cars owned and operated by the plaintiff in error (hereafter called the "defendant"). (Record pp. 10-13.)

The defendant answered denying liability (Record pp. 14-16), and the case was set for trial for October 13, 1914, but, prior to the trial, on September 15, 1914, the said J. W. Frescoln died, and thereafter, on November 27, 1914, the defendant in error, Anna F. Frescoln (hereinafter referred to as the "plaintiff") in her own right and as administratrix of said J. W. Frescoln, was substituted as plaintiff in said action, and on December 7, 1914, the said Anna F. Frescoln individually and as such administratrix, served and filed a sup-

plemental complaint alleging, in addition to the matters set forth in the original complaint, the death of said J. W. Frescoln and the expenses incident thereo, and praying for judgment in the sum of $20,613. (Record pp. 17-19.)

The defendant answered said supplemental complaint (Record pp. 20, 21) and thereafter said cause came regularly on for trial on March 16, 1915, before a jury, and resulted in a verdict for plaintiff in the sum of $2,500. (Record p. 8.) The defendant thereafter moved for judgment notwithstanding the verdict, which motion was granted by the trial court on April 5, 1915. (Record pp. 8, 9, 22, 23.) Thereafter plaintiff in said action appealed from said judgment notwithstanding the verdict to the Supreme Court of the State of Washington and on February 29, 1916, the Washington Supreme Court reversed the judgment with directions to the lower court to enter judgment upon the verdict (Record pp. 35-37), and a judgment upon the verdict for $2,500, interest and costs, was entered by the lower court on April 15, 1916. (Record pp. 37-39.)

Before the said appeal in the former action plaintiff, Anna F. Frescoln, on May 11, 1915, instituted this action in the Superior Court of the

State of Washington for King County, in which she, as the widow of J. W. Frescoln, sought to recover $25,000 damages for the death of said J. W. Frescoln, it being alleged in the complaint that the death of said J. W. Frescoln on September 15, 1914, was caused by the injury he received while alighting from the defendant's car on November 22, 1913. (Record pp. 1-5.)

The defendant, being a non-resident corporation (Record p. 2), elected to remove said action to the United States District Court for the Western District of Washington, Northern Division, and on June 7, 1915, the record on removal was filed with the clerk of said court. (Record p. 5.) The defendant thereafter answered setting up the former action first instituted by said J. W. Frescoln and the judgment secured therein as a second affirmative defense and plea in bar and making a part of said second affirmative defense copies of the pleadings and judgment for the defendant notwithstanding the verdict (the appeal not having yet been determined) as exhibits attached to said answer. (Record pp. 5-23.)

On July 17, 1915, the plaintiff, Anna F. Frescoln, interposed a motion to strike from said answer the second affirmative defense and plea in

bar for the reason that the same was irrelevant (Record pp. 24, 25), which motion was thereafter denied by the District Court (see opinion of Judge Neterer, Record pp. 26-31).

As already noted, the Washington Supreme Court thereafter reversed the judgment of the lower court in the original action brought by J. W. Frescoln, and on April 15, 1916, in accordance with the direction of the Supreme Court, judgment on the verdict was made and entered in said action, which judgment was thereafter paid and satisfied in full. (Record pp. 36-39.)

On April 24, 1916, the plaintiff in this action, Anna F. Frescoln, upon leave of court (Record p. 34) served and filed herein an amended reply admitting the institution of said action by the said J. W. Frescoln, and all of the proceedings therein as heretofore set out, but alleging the appeal prosecuted in said action, the reversal of the judgment by the Supreme Court and the entry of the judgment upon the verdict, and praying for judgment upon the pleadings. (Record pp. 35-37.) In addition the plaintiff herein made a part of her answer the judgment upon the verdict in the former action. (Record pp. 37-39.)

The issues being made up, this action came regularly on for trial on June 28, 1916, and after the jury was impaneled but before any evidence was introduced, the defendant objected to the introduction of any testimony and moved for judgment in favor of the defendant upon the pleadings for the reason that the pleadings showed that the deceased had instituted an action for the personal injuries he received during his lifetime, which action after his death had been revived and prosecuted to judgment by the plaintiff, Anna F. Frescoln, and said judgment satisfied, both of which motions the court denied. (Record pp. 49-53.) The cause then proceeded to trial, resulting in a verdict for the plaintiff, Anna F. Frescoln, for $4,500.00 (Record p. 40), and thereafter on July 10, 1916, a decree was entered upon the verdict. (Record pp. 40, 41.)

The defendant petitioned for a new trial upon the grounds urged in this review proceeding, which petition was likewise denied by the lower court on September 21, 1916. (Record pp. 42-48.) From the judgment entered upon the verdict this writ of error is prosecuted. (Record pp. 58-60.)

SPECIFICATIONS OF ERROR.

I.

The court erred in overruling defendant's objection to the introduction of any testimony on the ground that it was admitted by the pleadings that the said J. W. Frescoln during his lifetime had instituted an action for the personal injuries upon which this action is based, which action, upon the death of said J. W. Frescoln, had been revived and prosecuted to judgment by the plaintiff herein. (Record pp. 49-51.)

II.

The court erred in denying defendant's motion for judgment for the defendant on the pleadings on the ground that it was admitted by the pleadings that the said J. W. Frescoln during his lifetime had instituted an action for the personal injuries upon which this action is based, which action, upon the death of said J. W. Frescoln, had been revived and prosecuted to judgment by the plaintiff herein. (Record pp. 51-53.)

III.

The court erred in refusing to instruct the jury to return a verdict for the defendant. (Record p. 53.)

IV.

The court erred in overruling defendant's petition for a new trial. (Record pp. 42-48.)

ARGUMENT.

The specifications of error will be discussed together since they are all based upon the holding by the court below that the prosecution to judgment by the widow and administratrix of the action brought by the deceased in his lifetime, was not a bar to the subsequent action brought by the widow for the wrongful death.

The question presented is one which has never been squarely decided either by the Washington Supreme Court or by the Federal Courts, and is answered by construction to be placed upon Sections 183 and 194 of Rem. & Bal. Code. Section 183 provides:

"The widow, or widow and her children, or child or children if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds and all aiders and abettors. When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. *If the deceased leave no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him for support and who are resident within*

the United States at the time of his death, may maintain said action. When the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square or wharf, his heirs or personal representatives, *or if deceased leaves no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him for support, and who are resident within the United States at the time of his death,* may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, as under all circumstances of the case may to them seem just."

Section 194 provides:

"No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, *or leaving no wife or issue, if he have dependent upon him for support and resident within the United States at the time of his death, parents, sisters or minor brothers;* but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children, or if no wife, in favor of such child or children, *or if no wife or child or children, then in favor of his parents, sisters or minor brothers who may be dependent upon him for support, and resident in the United States at the time of his death.*"

Prior to 1909 the above sections read the same as quoted, omitting, however, the portions in italics. The Legislature of 1909 by separate acts amended these two sections by adding thereto that portion

italicized. (See Laws of Washington 1909, p. 425, Sec. 1; p. 566, Sec. 1.)

Section 183 above quoted, provides for an action for wrongful death, and will hereafter be referred to as the "death act." Section 194 provides for the survival of an action for personal injuries occasioning death, and will be hereafter referred to as the "survival act."

Section 183, the "death act," was first passed in 1854, was amended in 1875, and was made part of the Code of 1881, after which it was not amended until 1909. (See Laws of 1854, p. 220, Sec. 496; Laws of 1875, p. 4, Sec. 4; Code of 1881, Sec. 8.)

Section 194, the "survival act," was first passed in 1854 (Laws of 1854, p. 220, Sec. 485), was embodied in the Code of 1881 (Code of 1881, Sec. 18), and was not thereafter amended until 1909. It will be seen that both of these sections were part of the Code of 1881, and neither was amended from that time until 1909, when the portion italicized was added by amendment.

Before reviewing the decisions of other states we deem it important to examine the Washington cases which tend to throw light upon the construction of these sections.

It will be observed that under the death act the action for wrongful death may be maintained by the "heirs or personal representatives" of the deceased, but it has been uniformly held by the State Court that the word "heirs," as used in this section, is limited to such heirs as are expressly mentioned in the section, such as the widow and children, and does not include the parents or collateral relatives, except as expressly mentioned.

Noble v. Seattle, 19 Wash. 133.
Nesbitt v. R. Co., 22 Wash. 698.
Robinson v. R. Co., 26 Wash. 484.
Copeland v. Seattle, 33 Wash. 415.
Johnson v. S. E. Co., 39 Wash. 211.
Manning v. T. R. & P. Co., 34 Wash. 406.

It has likewise been held that where the action is brought by the personal representatives of the deceased, "it is not for the benefit of the estate but for the sole benefit of the widow and children who share jointly in the damages recovered."

Copeland v. Seattle, 33 Wash. 415.
Koloff v. R. Co., 71 Wash. 543, 549.

An examination of the statutes above quoted will show that the same relatives in whose favor the action for personal injuries causing death may

be revived under the survival act, are made the beneficiaries of an action for wrongful death under the death act. Unlike similar statutes of other states the statutes of Washington do not permit one class of heirs to revive an action for personal injuries and another class to recover for the wrongful death, but the same heirs who are permitted to revive the action for personal injuries are given the fruits of the action for wrongful death. To our mind, this is one of the most convincing indications that the Legislature never intended by these two acts to permit two concurrent actions, one for the personal injuries and one for the wrongful death. So far as we have been able to find, in all of the states where two such concurrent actions are permitted the two actions are maintained in *two different and distinct rights.* The action under the survival statute is brought by the personal representative for the benefit of the estate of the deceased, while the action under the death statute is brought by or for the benefit of the heirs expressly mentioned in the various death statutes of the different states. If one statute made the estate of the deceased the beneficiary, and the other made certain heirs the beneficiary, it might with some reason be urged that the Legislature intended

by the two sections that two concurrent actions might be maintained, the one for the personal injuries, and the other for the death, but that, as we have shown, is not true in this state, and is the vital distinction between the statutes of this state and those of states where two concurrent actions are allowed.

Although the State Court has never squarely decided this point, it has in several cases held it not to be the legislative purpose to permit two independent actions for injuries resulting in death.

Section 717 of the Code of 1881 provided that the personal representatives of a person whose death is caused by the wrongful act of another might maintain an action for his death for damages not to exceed $5,000, and the amount recovered should be administered as other personal property of the deceased person. Section 8 of the Code of 1881 is the same as Section 183 of Rem. & Bal. Code above quoted, and which was enacted subsequently to said Section 717, and provided, as we have shown, that when the death of a person is caused by the wrongful act of another, his heirs, or personal representatives, may maintain an action for damages against the person causing the death. Here was an instance where one statute

provided for a recovery by the personal representatives for the benefit of the estate, and the other section provided for a recovery for the benefit of the heirs named in the section, as we have shown, and yet it was held in the case of *Graetz v. McKenzie*, 3 Wash. 194, that the two sections were repugnant and that Section 8 (Section 183 above quoted) superseded said Section 717. In so holding the court said:

"Here, then, we have the same persons authorized to maintain two different actions against the same party or parties, for the same wrongful act, in one of which not more than $5,000 may be recovered, and in the other any amount that may to the jury, under the circumstances, seem just; and in both of which the same parties, the heirs, may be beneficiaries, in whole or in part. If the action be brought under Sec. 8 by the personal representatives, the heirs may be the beneficiaries; if by the heirs themselves, then they certainly are the parties entitled to the amount recovered; and if the action be brought under Sec. 717, and there are no debts, or if the debts do not equal the amount of the recovery, the remainder will go to them by operation of law, as other personal property of the decedent. While we recognize the well established principle of law that repeals by implication are not favored, and that it ought not to be presumed that the legislature intended to place or keep contradictory enactments in the code, or to repeal a law without expressing an intention to do so, we are nevertheless unable, by the application of any of the rules of statutory construction, to reconcile these two sections of the code."

Again the State Court has repeatedly held that although the action for wrongful death under the death act (Section 183) may be maintained by either the personal representatives, or by the several beneficiaries named in the statute, *yet but one action can be maintained.*

Copeland v. Seattle, 33 Wash. 415.
Riggs v. R. Co., 60 Wash. 292.
Koloff v. R. Co., 71 Wash. 543, 549.
Benson v. Lumber Co., 71 Wash. 616.

In *Copeland v. Seattle*, 33 Wash. 415, 421, the court said:

"It is true, the defendant cannot be subjected to two actions *for the one cause*," etc.

In *Riggs v. R. Co.*, 60 Wash. 292, 294, the court said with respect to Section 183:

"This language indicates an intention to grant one cause of action only, to be prosecuted in a *single proceeding* by the heirs or personal representatives of the deceased. Were we to hold that a separate action could be maintained by each independent heir, such a ruling might, in some instances, result in subjecting the negligent party to a multiplicity of suits for a single wrongful act."

But the state case most nearly in point is that of *Longfellow v. Seattle*, 76 Wash. 509. There the Supreme Court had under consideration the right of the surviving wife of a fireman to cumulative

recoveries under the general death statute above quoted, and Rem. & Bal. Code, Section 8068, providing that whenever any member of the fire department of a city shall lose his life while in the performance of his duty, then, upon satisfactory proof of such facts, the board having charge of such pension fund should pay the surviving widow a monthly pension of one-half the salary of the fireman at the time of his death. The Supreme Court held that these two acts authorize separate and coextensive but not cumulative recoveries, since *it is the policy of the law not to allow two recoveries for one wrong*, and that hence the acceptance of a pension by the widow precluded any recovery under the general statute for wrongful death. In so holding the court said:

"An examination of the statutes will show that there are deaths from wrongful acts cognizable under the general statutes that are not provided for under the pension act, and that the pension act authorizes the payment of pensions for deaths for which no recovery can be had under the general statute. But in so far as they do coincide, we think they were intended to afford separate and coexistent remedies, *permitting but one recovery for the one death rather than cumulative recoveries.* It will be remembered that no action lay to recover for the death of another at the common law, but that the right is wholly statutory. It will be remembered, also, that in this state exemplary or punitory damages are not recoverable

unless expressly so provided by statute, and that neither of these statutes provide for exemplary or punitory damages. The purpose of the statutes, then, is compensation for the wrong suffered. They are wholly remedial, and *since it is not the policy of the law to compensate twice for the same wrong, we think it must follow that the acceptance of the benefits provided by the one is a bar to the pursuit of the other.*"

* * * * * *

"For authority on the proposition that the adoption of one remedy by a person having a choice of remedies bars the right to invoke another, we need not look beyond our own cases. It was so held in *Achey v. Creech*, 21 Wash. 319, 58 Pac. 208; *Gaffney v. McGrath*, 23 Wash. 456, 39 Pac. 973; *Babcock, Cornish & Co. v. Urquhart*, 53 Wash. 168, 101 Pac. 713; *Gabrielson v. Hague Box & Lum. Co.*, 55 Wash. 342, 104 Pac. 635, 133 Am. St. 1032, and in *Pickle v. Anderson*, 62 Wash. 552, 114 Pac. 177."

Precisely the same rule should apply in the case at bar. Note the language of the court: "It is not the policy of the law to compensate twice for the same wrong," etc. Does not the same reasoning apply to the case at bar? Can it be the policy of the law that the heirs of the deceased should recover full compensation for the injury received by the deceased, and that in a second action the same heirs be permitted to recover full compensation for the death of the injured party? To permit two recoveries would be not only to permit two actions by the same plaintiffs growing out

of the same wrong, but would be to permit the assessment of damages twice against the same defendant for the same wrongful act. Clearly this is not contemplated by the statute.

"The proposition relied on by the defendants in error, if correct, exactly doubles the operation of a statute which has already gone a bowshot beyond that of any other state; for it is claimed that this act gives the widow the full value of the life of the husband, even though he in his lifetime had received from the defendant compensation for the injury inflicted, and that evidence of the release cannot be introduced, either as a bar to her recovery, or to be considered by the jury in reducing the amount of the verdict. A decision which would announce, to persons who have settled with parties injured, that the settlement, instead of being in full, was only partial; that, if death ensues as a result of the injury, they must pay again, and this time the full value of the life of the deceased,—will be justly regarded as a great hardship, and it will come to the widow and children, not as the grant of a right heretofore unjustly withheld, but as a second payment of a claim already satisfied."

Southern Bell Tel. & Tel. Co. v. Cassin,
111 Ga. 575, 36 S. E. 881.

The question presented in the above case was whether an action for wrongful death existed when the deceased, during his lifetime, had compromised the claim for the injuries from which he died, but the principle, we submit, is the same. The Cassin

case was followed by the State Supreme Court in *Brodie v. Washington Water Power Co.*, 92 Wash. —, 159 Pac. 791.

It will be urged, however, that concurrent actions should be allowed because the elements of damage in the two actions are not exactly the same, and it will be claimed here as it was claimed in the lower court, that in the action for personal injuries the widow could only recover for the pain and suffering and expenses incident to the personal injuries, while in the action for wrongful death she should be allowed to recover for the value of the life of the deceased. But there is nothing in the survival act that so limits the amount of recovery. The statute contains positively no limitation whatsoever as to the elements of damage for which recovery may be had. For the court to confine such recovery to the pain and suffering sustained by the deceased would be, not statutory construction, but judicial legislation. Where the deceased prosecutes the action to judgment in his lifetime he recovers the full amount of his damages growing out of such injuries including pain and suffering, impairment of earning capacity, and the expenses incurred, and there is nothing in the survival act in the remotest degree indicating that

the beneficiaries mentioned in the statute cannot recover the full amount that deceased could have claimed had he himself brought the action in his lifetime. This being true, it is apparent that under the survival act the beneficiaries recover precisely the same items of damage as they are allowed to recover under the death act. As an extreme case, let us suppose as a result of a personal injury sustained a man 30 years of age and earning $100 a month loses both arms and both legs but nevertheless survives his injuries for the period of a year and then dies. It is clear that if he brought an action during his lifetime he would, if the defendant were liable, be entitled to recover for his pain and suffering, the expenses incurred and for the total loss of his earning capacity during his life expectancy of 35 years. If he instituted an action for his personal injuries in his lifetime and died during the pendency of such action, and such action were revived and prosecuted to final judgment by his widow, clearly under the survival statute (Section 194) the widow would be entitled to recover precisely what damages the deceased would have been entitled to recover in his lifetime.

But let us suppose that the widow and minor children instead of reviving the cause of action

of the deceased, sue for the wrongful death under the death act. What is the measure of their damages? It is the value of the life of the husband and father, and *this is determined by the wage-earning power of the deceased at the time of his injury and during his life expectancy.* Damages by way of solace to the affections of the wife or children are not allowed.

Walker v. McNeil, 17 Wash. 582.

It may be urged that there is an added element of damage,—the loss of protection, intellectual and moral culture in the case of minor children, but this, if in fact an element of damage, is more than offset by taking into consideration the inroads made upon the income of the deceased had he lived, for his own support and maintenance during his life expectancy, for it must be apparent that where the widow and children are permitted under the survival act to recover for the loss of the earning power of the deceased during his life exceptancy, this would amount to far more than the pecuniary loss to the widow and children of the deceased as a bread-winner where the personal expenses of the deceased during his life expectancy are deducted. A man might earn $100 a month and spend $50, leaving a net loss to the persons

dependent upon him for their support of $50 a month, whereas if the widow under the survival act recovered the full amount of the damage to the deceased for his lost earning capacity she would recover the full amount of $100 a month during his life expectancy, or double the amount she could recover under the death act for loss of his support.

In this connection the following question is at once suggested: If the Legislature contemplated a recovery under both the death act and the survival act was it intended that the beneficiary should recover for the value of the life of deceased after the injury, or was it intended that recovery should be had for the value of the life of the deceased before he was injured? Unless the Legislature intended by the two statutes to allow the recovery of double damages for the same injuries by the same heirs we must conclude that if an action for wrongful death is allowed in addition to the action for personal injuries under the survival act, then the beneficiary in the second action could recover only for the value of the life of the deceased *after having sustained the injuries from which he died.* It must be apparent that to permit such a recovery would be to permit no recovery at all, for the

beneficiaries could not recover under the survival statute unless the personal injury sustained by the deceased was the cause of his death, and if such injuries were sufficiently grievious to cause his death, it is apparent that after the injuries were sustained his earning capacity would be destroyed and his death would result in no loss of support to his dependents. Instead of being a bread-winner he would be a positive burden. To revert to the former illustration,—of what value could the life of a man who has lost both arms and both legs be to the surviving wife and children? It is apparent that his death would be a blessing rather than a loss.

I an action under the survival act such damages can be recovered as the deceased could have recovered at any time before his death.

Brodie v. Washington Water Power Co., 92 Wash. ——, 159 Pac. 791.

That such damages were not confined to the pain and suffering sustained by the deceased was recognized in *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 97, where the court in passing upon a claim of an excessive verdict in such a case apparently took into consideration the earning capacity of the deceased at the time of his injury.

Plaintiff can scarcely be heard to urge that it was not her purpose in the first action to recover the full amount of damages that the deceased could have recovered in his lifetime. In the action which he brought deceased asked for damages in the sum of $5,323.00. (Record p. 15.) After his death plaintiff in her supplemental complaint in said action demanded judgment for $20,613.00 (Record p. 19), nearly four times as much as the judgment prayed for by the deceased for the same injuries,—inconsistent, we say, with the theory that it was not the purpose of plaintiff in that action to recover the full amount of the damages sustained by the deceased.

While, as we have said, the State Court has never decided the precise question presented here it has very recently held that the right of the widow and children to maintain an action for the wrongful death caused by a personal injury is barred by a release and satisfaction given by the person injured during his lifetime.

Brodie v. Washington Water Power Co., 92 Wash. —, 159 Pac. 791.

The foregoing decision is in harmony with the great weight of authority, and to our mind,

should be decisive of the case at bar. The theory upon which it is urged that the heirs may maintain concurrent actions under the survival and death statutes is that the action for wrongful death is purely statutory, and is a new cause of action which springs into being upon the death of the injured party in favor of the beneficiaries named in the statute, and is wholly independent of the right of action of the deceased which survives in favor of the heirs. But if the cause of action for the wrongful death is barred by a settlement made by the deceased in his lifetime, does it not necessarily follow, where the cause of action of the deceased for personal injuries is prosecuted to judgment by the surviving heirs and such cause of action thereby merged in, and wiped out by the judgment, that such judgment must necessarily be a bar to the action for wrongful death under the death statute?

In the Brodie case (92 Wash. —, 159 Pac. 791), the State Court, as we have said, held that a release given by the deceased during his lifetime was a bar to a recovery for his wrongful death. In so holding the court said:

"The arguments for and against the proposition, with a collation of the authorities, will be found in the opinions of the court and in the opin-

ions of the dissenting judges in the cases of *Southern Bell Tel. Co. v. Cassin*, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694, and *Rowe v. Richards*, 35 S. D. 201, 151 N. W. 1001, L. R. A. 1915E, 1075, the first of which maintains and the second of which denies the rule.

"It is the opinion of the majority of this court that the better reason is with the cases holding with the affirmative. This view requires an affirmance of the judgment of the court below; and it is so ordered."

Thus the Washington Supreme Court adopts as its own, the dissenting opinions in *Rowe v. Richards*, 135 S. D. 301, 151 N. W. 1001. The following is quoted from dissenting opinion of Judge Smith:

"It seems to me that a good many decisions of other courts, as well as the majority opinion of this case, present a somewhat confused interpretation of these statutes, which were enacted only for one distinct purpose, viz., that of abrogating two rules which became incorporated in the ancient common law: First, 'that the death of a human being cannot be complained of as a civil injury for which damages are recoverable in a court of law;' and, second, 'that a right or cause of action which belonged to an injured person while living is extinguished by his death.' Denunciation of these ancient rules may add somewhat to our appreciation of our own modern wisdom, but it serves no real purpose in the discussion of these statutes. Those rules, however, must necessarily be considered in the interpretation of these statutes, and the objects

sought to be accomplished by their enactment. The character and effect of particular statutory changes in the common-law rules referred to in our own state, and in other states, should be our guide in the interpretation of such statutes. It seems to me that nearly all the fallacies of reasoning and conflicting views found in the decided cases arise from a total or partial misconception of the real purpose of this class of legislation. It was not its purpose to enlarge or change any existing law which made it the duty of the husband to support the wife, nor to change the law which gave her the legal right to demand support from him. It was not intended in any degree to change or limit the husband's control during his lifetime of property or choses in action which might ultimately be devoted to her support. It was intended only to secure to her that which, under common-law rules, she would have lost upon the happening of his death. The statutes, I think, should be construed as many courts have construed them, merely as intended to authorize a recovery of damages after the death of the husband for a previously uncompensated injury to the husband's earning capacity. It must be conceded that the reasoning and logic in many of the decided cases is unsatisfactory, and subject to criticism. This, I think, is due largely to a misconception of what constitutes the cause of action, and because, as said by Justice Whiting, some courts have failed 'to distinguish between a cause of action and one single element of such cause of action.' All of these statutes, however, no matter what their phraseology, were primarily intended to accomplish a single purpose—the abrogation of the common-law rules which inhibited a civil remedy in damages for a wrongful death, or for personal injuries which later result in death. They all deal with conditions which arise after the death of the person injured. The right

of action, under all statutes, must therefore necessarily be vested in a third person, either the personal representative for the benefit of the estate, or for the benefit of particular persons named in the statute, or given to particular beneficiaries, such as the wife or children."

* * * * * *

"No one doubts a single wrongful act may result in separate and distinct injuries to two or more separate and distinct persons or rights, and that either of such injured persons may maintain an action for his own distinct damage. Nor will any one deny the power of the Legislature to split the total aggregate damages resulting from a wrongful injury to the husband by giving a part to the estate and a part to the wife. *But I think no one will assert that legislative power exists to require the wrongdoer, first, to pay the total aggregate damages to the estate, and, again, to pay the total aggregate damages to the wife. The controlling principle is that, when the wrongdoer has once paid the agreed, or legally ascertained, total damages, to the person entitled to receive the same, at the time such payment is made the original wrongful act is fully satisfied and the right of action therefor extinguished.*"

* * * * * *

"Some courts have viewed this rule of damages as a 'new cause of action' created by statute. No wonder, when one court insists that these acts are survival statutes, and another that a rule of damages creates a new 'cause of action' never heard of before, that there should be conflict of decision, lame reasoning, hair-splitting distinctions, profound and abstruse definitions of terms, and almost hopeless confusion. And this in face of the fact quite universally conceded by the courts that the Lord Campbell Act was conceived and enacted only because of, and to abrogate, the two common-

law rules referred to above, as is shown by the criticism of those ancient rules in the majority opinion, and in the elaborate quotations from certain courts. The fact is that these statutes were enacted for only one purpose, and were not intended or designed to change any right of the husband to deal in his lifetime with his property or choses in action, no matter in what way or to what extent his exercise of that right might affect the wife's means of support or the value of his estate."

The following is also quoted from the dissenting opinion of Judge Gates:

"It is not the death which is the cause of action, but it is the negligence which caused the death that is the cause of action, and the death is material only as it relates to the damages which may be recovered. Cooley on Torts (2d Ed.) 309."

* * * * * *

"*I think we erred in the former decision in this case* (32 S. D. 66, 142 N. W. 664) *when we said that there were two causes of action, and that 'neither is the prosecution or satisfaction of either a bar to the prosecution and recovery on the other.' That error ought now to be corrected.*"

These dissenting opinions having been adopted by reference by the State Court, there can be no doubt as to the decision of that Court when called upon to decide the question raised by this appeal.

According to the learned opinions quoted the death and survival acts were enacted for the single purpose of correcting the injustice done by the common-law in not permitting those dependent upon

the deceased for their support to recover either for his injuries or for his death. The fact that the Legislature deemed it proper to abrogate these two common-law rules by two separate sections instead of one does not mean that it was intended in an action for the injuries themselves, to require the wrongdoer to pay the total aggregate damages, and in another action by the same heirs to require him again to pay the total damages sustained. That such was not the legislative intent was decided in *Longfellow v. Seattle* 76 Wash. 509, (previously cited) holding that where two statutes permitted a recovery for death, a recovery under one statute barred a recovery under the other, on the principle that the adoption of one remedy by a person having a choice of remedies bars the right to invoke the other.

It is held with apparent unanimity that where the deceased has prosecuted to judgment in an action for her personal injuries in his lifetime, such judgment is a bar to an action brought thereafter by the statutory beneficiaries to recover for his wrongful death.

Kling v. Torello, 87 Conn. 301, 87 Alt. 987.

Hecht v. R. Co., 132 Ind. 507, 32 N. E. 302.

Dougherty v. New Orleans, etc. Co., 132 La. 993, 63 So. 493.

Strode v. St. Louis Transit Co., 197 Mo. 616, 95 S. W. 851.

Littlewood v. N. Y., 89 N. Y. 24.

Legg v. Britton, 64 Vt., 652, 24 Alt. 1016.

Perry v. R. Co., 1 Boyce (Del.) 399, 77 Alt. 725.

Reed v. R. Co., 37 So. Carolina, 42, 16 S. E. 289.

Edwards v. Interstate Chemical Corp., — N. Carolina —,87, S. E. 635, and many other cases that might be cited.

We quote the following from *Hecht v. R. Co.*, 132 Ind. 507, 32 N. E. 302, 303:

"In such an action the injured party is entitled to recover full compensation for all the injuries which were the natural consequence of the wrongful act. It was certainly not the intention of the legislature that when the person guilty of the wrong has been once subjected to a suit by the injured party in his lifetime, and compelled to pay all of the damages resulting from the injuries sustained by the wrongful act, he should again be liable to an action in favor of the personal representatives of the injured party after his death, and be again compelled to respond in damages for the same act."

Bearing in mind that the purpose of the survival statute was to give to dependent heirs the

remedy which the deceased himself had during his lifetime, the same rule should apply whether the action for personal injuries was prosecuted to judgment by the deceased in his lifetime or by the statutory beneficiaries after his death.

We will now examine the authorities from other states in which the question involved in this appeal is directly considered. In the case note published in 8 L. R. A., New Series, p. 365, the learned author says:

"The weight of authority, based on reasons which are irreconcilable, holds that a recovery of a judgment in one of these actions will bar a recovery under the other."

In *Perry v. R. Co.*, 1 Boyce (Del.) 399, 77 Alt. 725, 734, the court after an extended review of the authorities, concludes:

"Whether recoveries may be had under both the survival and death provisions of the statute for a single act of violence or negligence, the American decisions, as we have indicated, are in conflict. *The decisive weight of authority is to the effect that the Legislature never intended to allow two actions for the same injury.*"

This is true in face of the fact that in most if not all of the states having both a survival statute and a death statute the action for personal injuries can be brought only by the personal representative

for the benefit of the estate, while the action for wrongful death can be prosecuted only by, or for the benefit of the next of kin. As indicated by the author first above quoted, the reasons given by the courts for their decision are irreconcilable, yet the majority for one reason or another make an effort to avoid the injustice which would necessarily result from permitting the personal representative to recover for damages for the personal injuries, and later permitting the heirs to recover the total aggregate damages resulting in the death.

PENNSYLVANIA.

In Pennsylvania there is a survival statute in favor of the personal representatives, while in another section giving certain heirs a right of action for wrongful death caused by the negligence of another, where no suit has been brought by the injured party in his lifetime. Under these statutes it has been held in that state that two actions can not be maintained, the one for personal injuries and the other for wrongful death.

McCafferty v. Pennsylvania R. Co., 193 Pa. St. 339, 44 Alt., 435.

Edwards v. Gimbel, 202 Pa. 30, 51 Alt. 357.

In the McCafferty case first above cited, the court said:

"The action was commenced by the deceased six months before his death, and after his death it was carried on by his mother, who, as administratrix of his estate, had been substituted as plaintiff. This was done under the eighteenth section of the act of April 15, 1851, which gives to a common-law action the quality of survivorship. The nineteenth section of the same act creates a new right of action, unknown to the common law, and limited to cases where death has resulted from violence or negligence, and no suit has been brought by the injured party in his lifetime. The act of April 26, 1855, designates the persons who may exercise the right conferred by the nineteenth section of the act of 1851. *Railroad Co. v. Decker*, 84 Pa. St. 419; *Birch v. Railway Co.*, 165 Pa. St. 339, 30 Alt. 826. Under these acts two actions cannot be sustained for the same injury. *If the party injured has brought an action and died, it may be continued by his executor or administrator for the benefit of his estate, but in such a case no new action can be brought under section* 19. If he has not brought an action, the parties designated by the act of 1855 may do so, and the recovery is in their right. Taylor's Estate, 179 Pa. St. 254, 36 Alt. 230; *Maher v. Traction Co.*, 181 Pa. St. 617, 37 Alt. 571. If the action is continued for the benefit of the estate, the measure of damages is the loss sustained by the injured party. In the opinion in *Maher v. Traction Co., supra*, it was said by the present chief justice: '*As the action has been brought in the lifetime of the injured party, and had survived by virtue of section* 18 *of the act of* 1851, *it logically follows that the damages recovered by her personal representatives should be the same as she could have recovered had death*

not ensued. Included therein are damages for her pain and suffering up to the time of her death, and diminution of earning power during a period of life which she would have probably lived had the accident not happened. It is a mistake to suppose that the recovery in this case is for the death. It is still for the personal injury.' "

The foregoing opinion is quoted from so extensively for the reason that it points out so clearly that the damages recoverable under the survival statute are identical with those recoverable in a proper action under the death statute.

MICHIGAN

Michigan also has a survival act which provides that a cause of action for negligent injuries to a person shall survive, as well as a death act providing that whenever the death of a person shall be caused by the wrongful act of another, the person causing the death shall be liable to an action for damages in favor of the personal representatives of the deceased for the benefit of the widow or next of kin. The proceeds of the action under the survival statute go to the estate. The proceeds under the action for wrongful death go to the personal representatives for the benefit, as we have shown, of the widow or next of kin.

Under these statutes it is held in that state that a recovery cannot be had both for personal injuries and the wrongful death in two separate actions, but that where the death is instantaneous the only right of action is under the death act, while where the deceased survives for a period of time after being injured, the only recovery that can be had is under the survival statute.

Sweetland v. R. Co., 117 Mich. 329, 75 N. W. 1066.

Dolson v. Ry. Co., 128 Mich. 444, 87 N. W. 629.

Storie v. Elevator Co., 134 Mich. 297, 96 N. W. 569.

Rouse v. R. Co., 164 Mich. 475, 129 N. W. 719.

We beg leave to quote the following from the opinion of Chief Justice Long in the Sweetland case above cited, which is peculiarly applicable to the case at bar in view of the holding of the Washington Supreme Court that a release in the lifetime of the deceased is a bar to an action for wrongful death:

"Was it the intention of the legislature under section 7397 to give a right of action for the benefit of the estate in case of death from an injury, and also to allow the heirs to recover under sections 8313 and 8314 for their pecuniary loss?

I think not. The fact that the common-law right of action which survives under section 7397 is for the benefit of the decedent's estate, and that the right of action under section 8313 and 8314 is given for the benefit of the decedent's heirs, can make no difference in the construction which I think must be placed upon these statutes. It was not the intention of the legislature to give two rights of recovery for the same injury which results in death. The act giving a right of action for damages for wrongful death was passed by our legislature several years after the act providing for survival actions, and was intended to provide the only remedy where death resulted from any wrongful act. If Mrs. Aldrich, the decedent, had lived long enough to bring suit against defendant for injuries, etc., and pain and suffering, both past and future, and the jury had awarded her damages, which had been paid, and then she had died from the same injuries so wrongfully inflicted, would it be held that the administrator might maintain another action under sections 8313 and 8314? Or, had she survived her injuries long enough to have settled with the defendant, and had so settled, would it be held that the administrator could maintain an action under these sections? *It is generally held that if the deceased had settled for injuries received in his lifetime, or recovered damages in an action, an action cannot be maintained, under Lord Campbell's act, after his death. Cooley, Torts,* 309. *It must follow, therefore, that if such judgment obtained by her in her lifetime or settlement so made by her is a bar to a recovery by the heirs under sections* 8313 *and* 8314, *then a judgment obtained by the heirs for a cause of action accruing to them by survival under section* 7397 *would be a bar to the right to recovery for her death under sections* 8313 and 8314."

MAINE.

In that State the survival statute provides that if a person is injured through the negligence of another and afterwards dies, redress can be obtianed by his personal representative. Another statute permits a recovery for death by wrongful act, in the names of the personal representatives of the deceased person, the amount recovered to be for the exclusive benefit of the decedent's widow and children.

In *Sawyer v. Perry*, 88 Me. 42, 33 Alt. 660, the court held that these acts did not give two actions for a single injury, one for the benefit of the decedent's estate and another for the benefit of the widow and children, or next of kin, but that the death statute applied only where the death was instantaneous. In so holding the court said:

"So, in this case, *We cannot believe that the legislature intended by the act of* 1891, c. 124, *to give two actions for the single injury,—one for the benefit of the decedent's estate, and another for the benefit of his widow and children or next of kin.* We think the legislative intention was to extend means of redress to a class of cases where none before existed. This class of cases was still large. There still existed a large class of cases in which redress for injuries resulting in immediate death could not be had. And we cannot resist the conviction that it was the intention of the Legislature

to provide means of redress for this class of cases, and not to duplicate the wrong-doer's liability, and subject him to two actions for a single injury. Previous statutes of a similar character having been so interpreted, we cannot resist the conviction that the Legislature expected and intended that this statute should receive the same interpretation. Our conclusion, therefore, is that the act of 1891, c. 124, applies only to cases in which the persons injured die immediately."

In some of the states which have both survival statutes and death statutes, the courts in order to construe these two sections so as not to permit a recovery under each for the same injury, have held that the survival act is applicable only in cases where death results from some other cause than the injury and that if death results from such injury the personal action does not survive and the only right of action in such event is under the death act for the benefit of the heirs. It is so held in

ILLINOIS

Hulton v. Dally, 106 Ill. 131.

Bruns v. Welte, 126 Ill. App. 541.

Chicago Etc. R. Co. v. O'Conner, 119 Ill. 586, 9 N. E. 263.

RHODE ISLAND

The right to a double recovery is denied for the same reason in this state.

Lubrano v. Atlantic Mills, 19 R. I. 129, 32 Atl. 205.

KANSAS

The same rule obtains here.

McCarthy v. R. Co., 18 Kan. 46.

Hulbert v. Topeka, 34 Fed. 510 (construing Kansas statute).

MISSISSIPPI

It has been held under the statutes of this state that but one recovery for a wrongful act resulting in death can be had, and that where the widow of the decedent sues to recover damages suffered by herself and minor children for the death of her husband, she cannot thereafter sue as her husband's testatrix to recover damages sustained by the decedent himself.

Mobile Etc. R. Co. v. Hicks, 91 Miss. 273, 46 So. 360.

NORTH CAROLINA

Here the survival statute provides in effect that causes of action for personal injuries do not survive to the personal representatives unless such injuries shall cause the death of the injured party. The death statute gives an action to the adminis-

trator for wrongful death. Under these sections it is held that where death results from personal injuries, the right of action for the personal injuries which the deceased had prior to his death merges into the cause of action for the death which then becomes the only available remedy.

Bolick v. Ry. Co., 138 N. C. 370, 50 S. E. 689.

VERMONT

The statutes of Vermont with respect to the survival of actions for personal injuries and actions for wrongful death, are substantially the same as those of Washington, with the exception that the revived action for the personal injuries is prosecuted by the personal representatives of the deceased, while the recovery under the death act is for the benefit of the widow or next of kin. Under these statutes it was held in a long and well considered case that where a plaintiff in an action for personal injuries died from such injuries pending the action, and his administrator recovered judgment therein under the survival act, such judgment was a bar to an action by the administrator for the benefit of the widow or next of kin under the death act.

Legg v. Britton, 64 Vt. 652, 24 Atl. 1016.

KENTUCKY

In speaking of the survival and death statutes of the State of Washington, the Washington Court said in *Noble v. Seattle*, 19 Wash. 133, 135:

"There is a greater similarity between these provisions of our own statute and those of the State of Kentucky relating to the same subject than we have been able to find elsewhere."

A comparison of the Kentucky and Washington statutes bears out this finding of the court. The constitution of Kentucky provides that when the death of a person shall result from an injury inflicted by a wrongful act, damages may be recovered therefor, the action, until otherwise provided by law, to be prosecuted by the personal representative of the decedent, and the Kentucky statutes, Section 6, passed in pursuance of such constitutional provision, provided that the proceeds of such action should be for the benefit of and go to the kindred of the deceased in the order specified in the statute. This is the death act.

The survival act (Kentucky statute, Section 10) provides that the cause of action for personal injuries causing physical and mental suffering does not abate on the death of the injured person, and the courts of Kentucky have held that under this survival statute an action begun by

the deceased during his lifetime, for personal injuries sustained, may be revived and prosecuted to judgment by his personal representatives after his death. Under these statutes and similar earlier statutes it has uniformly been held in a long line of decisions by the courts of Kentucky that where the deceased instituted an action in his lifetime for personal injuries sustained, which was revived and prosecuted to judgment by his personal representatives, such an action was a bar to an action brought by the personal representatives to recover for his wrongful death.

Hansford v. Payne, 11 Bush. 385.

Conner v. Paul, 12 Bush. 144.

Donohue v. Drexler, 82 Ky. 157.

Hacket v. R. Co., 95 Ky. 236, 24 S. W. 871.

Louisville & N. R. Co. v. McElwain, 98 Ky. 700, 34 S. W. 236.

Owensboro & N. R. Co. v. Barclay's Adm'r., 102 Ky. 16, 43 S. W. 177.

Lewis v. Taylor Coal Co., 112 Ky. 845, 66 S. W. 1045.

Bowling Green Gas Light Co. v. Deane, 142 Ky. 678, 134 S. W. 1115.

Chesapeake v. Ohio R. Co. v. Banks' Adm'r., 142 Ky. 746, 135 S. W. 285.

We beg leave to quote the following excerpts from a few of the Kentucky decisions:

"Now, this court has decided, and settled the question, that, where certain acts cause death, they cannot be divided so as to make two actions,—one to recover for the suffering caused, and the other to recover for death. The party must elect. See *Conner's Adm'x. v. Paul*, 12 Bush, 147."

Hacket v. R. Co., 95 Ky. 236, 24 S. W. 871.

Owensboro & N. R. Co. v. Barclay's Adm'r., 102 Ky. 16, 43 S. W. 177.

" 'The acts causing the death of the party, from either the willful or ordinary negligence of the party charged, constitute but one cause of action, whether the measure of recovery sought is for the suffering of the intestate during his life or for the willful negligence causing his death. Different degrees of negligence cannot be established from the same acts of the party charged, so as to create different causes of action in favor of the party injured, or the injuries resulting from such negligence so severed as to create distinct causes of action by the same person. The statute has only enlarged the remedy, and given to parties a cause of action unknown to the common law. The party entitled to bring the action, either at common law or under the statute, must make his election; and, while the right of recovery under our statute for willful negligence may increase the measure of recovery, such an action is a bar to a cause of action that survived at common law upon the same facts. The acts constituting the wrong being inseparable, a recovery by the administrator for the mental and bodily suffering of the intestate is a bar to any proceeding under the statute, either by the personal representative or the next of kin.' This rule has been repeatedly followed and is now the well-settled law in this state. Where one is

injured through the negligent act of another, and death does not immediately ensue, the representatives of the deceased may, at their election, sue either for the pain and suffering endured by the deceased as a result of the injury, or for his death."

Conner's Adm'r. v. Paul, 75 Ky. 144.

Chesapeake v. Ohio R. Co. v. Banks' Adm'r., 142 Ky. 746, 135 S. W. 285, 288.

"There can be no substantial distinction between acts done by the decedent at the time of the injury or after the injury as affecting the right of his personal representative to recover where such acts on his part would bar him from recovering.

"*The rule that a personal representative cannot sue upon both causes of action is based upon the ground that the defendant committed a single wrong, the negligence or wrongful act which caused the injury, and that, while the law gives two remedies for the wrong, it was not contemplated that two recoveries should be had for one wrong.* The plain purpose of the act of 1854 was simply to do away with the common-law holding that no recovery could be had when death resulted immediately. The cause of action by that act was vested in the personal representative, and it was manifestly intended only to give him a remedy in cases where before there had been no remedy."

* * * * * *

"When the Legislature passed this statute, this court had several times held that the personal representative could not sue upon both causes of action, and if the Legislature had contemplated changing that rule, and allowing two actions to be maintained for one injury, it must be presumed it would have clearly so declared; for *it has long been*

a rule of the common law to allow only one recovery for one wrong, although several different remedies may be provided. If notwithstanding his settlement the representative of the decedent may recover in this action, he might equally recover if the decedent had brought a suit and recovered a large sum for his injury before his death."

Louisville Ry. Co. v. Raymond's Adm'r., 135 Ky. 738, 123 S. W. 281.

VIRGINIA

The Virginia death act provides for the recovery for wrongful death by the personal representative for the benefit of the wife or other relatives named therein. The survival act provides in effect that an action for personal injuries shall not determine or abate by the death of the injured party, but that the same may be revived in the name of his personal representative.

In *Brammer's Adm'r. v. Norfolk & W. Ry. Co.*, 107 Va. 206, 57 S. E. 593, the Supreme Court of Virginia held that where a party injured brought suit therefor, and died prior to its termination from his injuries, whereupon his administrator revived the action and prosecuted the same to judgment, the judgment was conclusive against the administrator's right to maintain a subsequent action for wrongful death. In so holding the court said:

"As suggested by counsel for defendant in error, *if this action could be maintained, it could also be maintained, although Brammer in his lifetime by compromise or by recovery in an action for his injuries had been compensated therefor.*

"We are wholly unable to see anything in the provisions of the statute to warrant the conclusion that by it two actions against the same defendant for the same injuries are authorized, so as to give an action in favor of the administrator representing the estate and also a second action in favor of the administrator representing the wife or children, or other beneficiency mentioned in the act.

"In 13 Cyc. 327, citing a number of authorities, it is said: 'While the authorities are by no means unanimous upon the point, the better doctrine seems to be that, where one in his lifetime recovers damages for personal injuries caused by negligence, and death subsequently results therefrom, his personal representatives or beneficiaries designated in the statute are barred from recovery under a statute giving them a right of action for death by wrongful act.' And further: 'Likewise, where the plaintiff in an action for personal injuries dies from such injuries pending the action, and his administrator recovers judgment therein, such judgment is a bar to an action by the administrator or the beneficiaries for the death by wrongful act.' In support of this last quotation, there are also a number of authorities cited.

"There is a great weight of authority for the proposition that a judgment for damages for personal injury by the wrongful act or neglect of another, or where the injured party has received satisfaction in his lifetime for the injuries he sustained, is a bar to the action under the statute by the personal representative for damages by reason of

the plaintiff's subsequent death. The real question here is whether a judgment against the plaintiff in error, the administrator of Brammer, based on the finding of the court on the same issue of fact and law presented to it, is a bar to a subsequent action involving the same cause of action.

"In our view of the statute we are considering but one action can be maintained to recover damages for injury to a person caused by wrongful act, neglect, or default of another person or corporation, as there is but one cause of action in such a case, and whether that action be brought by the injured party in his lifetime and revived after his death during the pendency of the action in the name of his personal representative, or a new action be brought within the statutory period, as provided in the statute, but one recovery can be had, and that for the benefit of the next of kin nominated in the statute where they exist, as in this case. Therefore, if there be a recovery in the action revived, or it be adjudicated in that action that the injured party had no right of action at his death, it is conclusive of the right to maintain another action to recover damages for the same injury."

It is to be especially noted that the Brammer case was followed by Judge Neterer in his decision in the court below on plaintiff's motion to strike the second affirmative defense.

Frescoln v. P. S. T., L. & P. Co., 225 Fed. 411.

Record, pp. 26-31.

It would seem that this decision should have carried at least some weight with the court in its decision of the question raised by this appeal.

UNITED STATES.

Before the amendment of 1910 of the Federal Employer's Liability Act, the right of recovery given to an injured employee was extinguished by the employee's death.

Michigan Cent. R. R. Co. v. Vreeland, 227 U. S. 59.

But in 1910, Congress added another section to the act of 1908, providing that any right of action given by said Act to a person suffering injury should survive to his personal representative for the benefit of the surviving widow, etc., "but in such cases there shall be only one recovery for the same injury."

U. S. Comp. St. 1913, § 8665.

Whether under this amendment two concurrent actions are permitted, one for the personal injuries and the other for the wrongful death, has never been passed upon by the Federal Courts, but the one State case that has as yet construed this act as amended—*Louisville & N. R. Co. v. Rhoda*, — Florida —, 71 So. 369,—holds that under the

1910 amendment the administrator had the option to sue for the injury resulting in the death, or to sue for the wrongful death itself, but could not sue for both. In so holding the court said:

"The court further charged the jury that the measure of damages, if the plaintiff recovered, would be the loss to the estate of the intestate, caused by the injury resulting in his death; that is, the amount he would probably have accumulated, reduced to its present money value. We find no fault in this. Under the amendment, as we construe it, without enlightenment on the subject from the final arbiter, the federal Supreme Court, *the administrator, in bringing the action, has the option to seek recovery either for the loss to the estate, as was here done, or for the loss to the beneficiary, the recovery in either case being for the latter's benefit, but he cannot recover for both losses.* If the liability of the intestate towards his parents indicated that their loss would probably be greater than the accumulations for himself, the administrator, suing for their benefit, might, upon proper declaration of these facts, recover the larger amount; on the other hand, if nothing or little was contributed to the beneficiaries under the statute, the administrator could recover the larger amount by using under the survivorship amendment."

Although, as we have heretofore pointed out, no Federal Court, so far as we can find, has ever been called upon to decide the exact question raised by this appeal, they have held that release given in the lifetime of the deceased for the personal injuries which resulted in his death consti-

tutes a complete bar to an action for wrongful death subsequently brought.

Lindsay v. R. Co. (C. C. A.) 226 Fed. 23.
N. P. Ry. Co. v. Adams, 192 U. S. 440.

As we have already urged, if a release given in the lifetime of the deceased is a bar to an action under the death statute then an action for the personal injuries sustained by the deceased in his lifetime and prosecuted to judgment by his personal representative under the survival act, should likewise be a bar to an action under the death statute.

There is one other consideration that should not be everlooked,—the very fact that neither the State nor the Federal Courts have ever been called upon to decide the question raised by this appeal, although these same laws have been upon the statute books since 1854, indicates clearly that it has been the common opinion of the bar that two concurrent actions could not be waged to final judgment in an action of this kind, and that a judgment in one action would be a bar to the other. We do not recall a single instance, prior to the one involved in this appeal, where two such suits have been brought.

"A further consideration in favor of a single action is the confusion of damages which would result from the maintenance of two actions. Although they might be theoretically seperate, a practical separation would be quite impossible. The measure of pain and suffering, or estimated damage to one's estate, cannot be so definitely marked as to limit liberality of a sympathetic jury.

"One more consideration may be noted. While a court may not be justified in resting a decision upon a common opinion of the bar, yet such an opinion, held and acted upon for a long time, furnishes a strong presumption that a decision in accordance therewith is correct. *We think that the common understanding has been that two actions could not be maintained. The memory of the members of this division, covering a period of more than* 30 *years at the bar and on the bench, does not recall an instance where two suits have been brought, and, in view of the diligence which has been shown by many attorneys in cases of this kind, it is hardly conceivable that the second one would have been omitted if it had been thought that it could be maintained.*"

Lubrano v. Atlantic Mills, 19 R. I. 129, 32 Atl. 205, 207.

But even if the heirs are permitted to recover both for the personal injuries and for wrongful death, nevertheless but one recovery should be allowed. As was pointed out by Judge Neterer in his decision upon plaintiff's motion to strike the second affirmative defense, a recovery under one of these sections "is predicated upon and supported

by the same facts" as a recovery under the other section.

Frescoln v. P. S. T., L. & P. Co., 225 Fed. 441.

A recovery cannot be had under the death act unless the deceased has sustained a personal injury which results in his death, and an action for personal injuries does not survive under the survival act unless such personal injuries result in the death of the person injured. As already pointed out, the same heirs who are permitted to recover under the death act are likewise permitted to recover under the survival act. The cause of action under the death act is the negligent act causing the personal injury followed by the death of the injured party. The cause of action under the survival act is the same. The only difference, if any, is in the measure of damages. On what theory then, can it be claimed that the defendant guilty of the negligent act should be burdened with two independent suits rather than one suit? The parties are the same. The facts stated in the complaint,—with the exception of the matter relating to the damages sustained, are identical. In fact there is but one cause of action, namely, the neg-

ligent act followed by the death of one injured party, the two sections merely providing for two different elements of damage, the one the damages sustained by the injured party which are for the benefit of the plaintiff, and the other the damages sustained by the plaintiff himself. To say that two independent actions may be brought in such a case is to say that a single cause of action can be split so as to permit two independent actions based upon a single cause of action where the plaintiff and defendant are the same in each action, which is never permitted. That a plaintiff will not be permitted to split his cause of action and recover a portion of the damages sustained as a result of a single wrong in one action, and later be permitted to maintain a second suit for other damages arising out of the same wrong, has been repeatedly decided by the State Supreme Court.

Achey v. Creech, 31 Wash. 319.
Bruce v. Foley, 18 Wash. 96.
Kline v. Stine, 46 Wash. 546.
Wheeler v. Aberdeen, 45 Wash. 63.

CONCLUSION.

Whatever may be the holding in states where the beneficiaries under the death act are different from those under the survival act, clearly in the State of Washington where not only the beneficiaries are the same but the same heirs may maintain the action for wrongful death that may revive the action for personal injuries sustained by the deceased, an action originally brought by the deceased himself and revived by the statutory beneficiaries and prosecuted to final judgment should be a bar to an action for wrongful death. This, we submit, should be the rule for the following reasons:

(1) The beneficiaries under the death statute and the survival statute are the same, and the Legislature certainly did not contemplate that the same parties plaintiff should be entitled to recover twice for the same wrongful act. These sections are a derogation of the common-law, and should be strictly construed.

(2) To permit two recoveries would be to permit double damages to be assessed against the wrongdoer, for it would permit a recovery of the full amount of damages sustained by the deceased,

and would then permit a second recovery by the same individuals for the full amount of damages resulting to them from the death of the deceased. This could not have been the legislative purpose.

(3) The State Supreme Court has held that a release given by the deceased in his lifetime is a bar to an action for wrongful death. It logically follows that the prosecution to judgment of a revived action for the personal injuries sustained in which all the damages sustained by the deceased are recovered, should also be an extinguishment of the right of the deceased and a bar to a subsequent or concurrent action for wrongful death.

(4) The State Supreme Court has held that where the widow of a fireman by one statute is given the right to recover as a beneficiary in a Fireman's Relief Fund and by the death statute herein quoted is given the right to recover for wrongful death, such widow has an election of remedies, and where she elects to recover under one statute such recovery is a bar to an action under the other.

(5) It has evidently been the common opinion of the bar of the State of Washington that two concurrent actions could not be maintained under the death and survival statutes.

(6) If a recovery can be had both for the personal injuries and for the death itself, in any event, since there is but one cause of action and since the beneficiaries under each statute are the same, the damages should be recovered in one suit and not in two.

For the reasons urged we respectfully submit that the judgment of the lower court should be reversed.

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